JOBNAME: No Job Name PAGE: 1 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



# Wee Choo Keong v Ketua Pengarah Perkhidmatan Awam Malaysia

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02–423 OF 2010
ABDUL WAHAB PATAIL, LIM YEE LAN AND MOHAMAD ARIFF JJCA
16 JUNE 2014

*Limitation — Government proceedings — Limitation period — Public Authorities Protection Act 1948 ('PAPA') — Whether action time-barred — Ex-Member of Parliament ('applicant') applied to court to quash decision of Pensions Department not to pay him pension on attaining age 50 — Department's decision conveyed in letter to applicant four years after he turned 50 — Whether limitation period of 36 months under s 2(a) of the PAPA should be calculated from date of Department's letter and not from time applicant turned 50 — Whether nature of injury caused to applicant (deprivation of pension since turning 50) continuing one — Whether applicant not guilty of unreasonable delay in filing judicial review application — Whether art 48(1)(e) of the Federal Constitution disqualifying MP from holding office only applied if MP found guilty of criminal offence and not if convicted for civil contempt of court*

The appellant ('Wee') was elected for a first term as Member of Parliament ('MP') from 1990 to 1995. In April 1995, he was re-elected as an MP ('the second term'). Two years earlier, the plaintiff in a civil suit against him and two other defendants, had obtained an ex parte injunction against them. On the ground that Wee had evaded service of the injunction and had breached the same, the High Court found him guilty of contempt and sentenced him to jail. On Wee's appeal, the Supreme Court on 14 April 1995 found him guilty only of contempt for evading service of the injunction and fined him RM7,000 instead. On account of the amount of the fine, Wee was disqualified from being an MP for the second term under art 48(1)(e) of the Federal Constitution. In mid-2007, Wee succeeded in his applications to set aside the injunction and to strike out the suit upon which it was based and only then wrote to the Pensions Department enquiring about its failure to pay him his pension for his first term as MP since he turned 50 years of age on 26 June 2003. Wee had, however, been paid his gratuity. In a reply dated 21 September 2007 ('the decision'), the Pensions Department informed Wee that he had lost his entitlement to the pension on account of the RM7,000 fine imposed upon him by the Supreme Court. The letter quoted para 14 of the first schedule to the Members of Parliament (Remuneration) Act 1980 ('MPRA') which, inter alia, stated that no pension or gratuity shall be granted to a person who had been disqualified from being an MP under art 48 of the Federal Constitution ('Constitution'). The letter stated that since the department had not been informed of any

JOBNAME: No Job Name PAGE: 2 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



removal of his disqualification, it was unable to pay him his pension. The letter also apologised to Wee for not having informed him of the department's decision either at the time of his sentence by the Supreme Court or when he had turned 50 on 26 June 2003. In October 2007, Wee applied to the High Court to quash the department's decision and for an order that the respondent pay him his arrears of pension since his 50th birthday with interest thereon until date of full payment. Although the High Court held that the disqualification under art 48(1)(e) of the Constitution only applied to a criminal offence and not to a civil contempt, which Wee was found guilty of, it dismissed Wee's application on the ground it was time-barred under s 2(a) of the Public Authorities Protection Act 1948 ('PAPA'). The Court held Wee should have filed his application within three years after he had attained his pensionable age of 50 on 26 June 2003. Wee appealed against the decision to the Court of Appeal.

**Held**, allowing the appeal, setting aside the decision of the High Court and granting the prayers sought for in the judicial review application:

(1) The court agreed with the High Court's decision that art 48(1)(e) of the Constitution did not apply to a conviction for contempt for breach of a court order in a civil court but disagreed with the conclusion that the appellant's claim was statute-barred (see para 6).

(2) The High Court failed to properly evaluate and consider the jarring inconsistency in the stand taken by the respondent, its inaction in corresponding with the appellant, the reasonable steps taken by the appellant to exhaust his legal avenues before filing the judicial review application, and, most importantly, the nature of the injury caused to him (the continuing deprivation of the pension, though not the gratuity), all of which were factors which should have compelled the High Court to calculate the limitation period of 36 months from the date of the letter written by the *Bahagian Pencen* dated 21 September 2007 (see para 21).

(3) The position taken by the respondent was inconsistent and untenable. If he was entitled to gratuity despite the conviction for civil contempt, surely he should likewise be entitled to his pension. It could not be right to now defeat the claim for the pension by a sterile reliance on limitation. Even the limitation argument had its flaws, for the facts showed a situation of a continuing injury ie a continuing denial of the appellant's pension entitlement since 20 June 2003. The 36 months bar had to be calculated not only 'next after the act, neglect or default complained of' but 'in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof' (see para 17).

(4) The court did not find any unreasonable delay on the appellant's part in filing the judicial review application since he had to exhaust his legal

JOBNAME: No Job Name PAGE: 3 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



avenues in the form of the appeal, and ultimately, the successful setting aside of the injunction order, followed by the striking out of the suit which was the foundation of the order in the first place. It would seem unfair to now penalise him for breach of an order, or even evasion of an order, which was subsequently proven to be incorrect in law (see para 18).

(5) With regard to art 48(1)(e) of the Constitution, given the context and wording of that provision, it must be limited to a conviction for a criminal offence since the removal of disqualification contemplated a situation where a free pardon could be received from the Yang di-Pertuan Agong. A person convicted and sentenced for civil contempt could not avail himself of a free pardon and therefore, by parity of reasoning, the provision could not be reasonably interpreted as including a civil contemnor. The contempt committed in the present case was more in the nature of a civil contempt since the purpose of the court order was to compel compliance for the benefit of a private party (the plaintiff in the civil suit). The offence was not essentially of a 'public' nature (see paras 19 and 20).

**[Bahasa Malaysia summary**

Perayu ('Wee') telah dipilih untuk penggal pertama sebagai Ahli Parlimen ('AP') dari 1990 hingga 1995. Pada April 1995, dia telah dipilih semula sebagai AP ('penggal kedua'). Dua tahun sebelum itu, plaintif dalam guaman sivil terhadapnya dan dua defendan lain, telah memperoleh injunksi *ex parte* terhadap mereka. Atas alasan bahawa Wee telah mengelak penyampaian injunksi itu dan telah melanggar pada masa yang sama, Mahkamah Tinggi telah mendapatinya bersalah kerana menghina dan menghukumnya penjara. Atas rayuan Wee, Mahkamah Agung pada 14 April 1995 telah mendapatinya bersalah hanya kerana penghinaan kerana mengelak penyampaian injunksi itu dan sebaliknya mendendanya RM7,000. Berdasarkan jumlah denda itu, Wee hilang kelayakan sebagai AP untuk penggal kedua di bawah perkara 48(1)(e) Perlembagaan Persekutuan ('Perlembagaan'). Di pertengahan tahun 2007, Wee berjaya dalam permohonannya untuk mengetepikan injunksi itu dan untuk membatalkan guaman yang mana injunksi itu berasaskan dan hanya kemudian menulis kepada Bahagian Pencen menanyakan tentang kegagalannya membayar pencen kepadanya bagi penggal pertama sebagai AP oleh kerana dia meningkat umur 50 tahun pada 26 Jun 2003. Wee telah, bagaimanapun, dibayar gratuitinya. Dalam jawapan bertarikh 21 September 2007 ('keputusan itu'), Bahagian Pencen memberitahu Wee bahawa dia hilang kelayakannya terhadap pencen oleh kerana denda RM7,000 yang dikenakan ke atasnya oleh Mahkamah Agung. Surat itu memetik perenggan 14 jadual pertama kepada Akta (Saraan) Ahli Parlimen 1980 ('ASAP') yang, antara lain, menyatakan bahawa tiada pencen atau gratuiti patut diberikan kepada orang yang telah hilang kelayakan daripada menjadi AP di bawah perkara 48 Perlembagaan. Surat itu menyatakan oleh kerana bahagian itu tidak diberitahu

JOBNAME: No Job Name PAGE: 4 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



apa-apa tentang pembatalan hilang kelayakannya, ia tidak boleh membayar pencennya. Surat itu juga memohon maaf kepada Wee kerana tidak memaklumkan tentang keputusan bahagian pada masa hukumannya oleh Mahkamah Agung atau apabila dia mencapai umur 50 tahun pada 26 Jun 2003. Pada Oktober 2007, Wee telah memohon kepada Mahkamah Tinggi untuk membatalkan keputusan bahagian itu dan untuk perintah agar responden membayarnya tunggakan pencennya sejak hari kelahirannya yang ke-50 bersama faedah sehingga tarikh bayaran penuh. Walaupun Mahkamah Tinggi memutuskan bahawa hilang kelayakan di bawah perkara 48(1)(e) Perlembagaan hanya terpakai untuk kesalahan jenayah dan bukan penghinaan sivil, yang mana Wee telah didapati bersalah, ia telah menolak permohonan Wee atas alasan ia telah luput masa di bawah s 2(1) Akta Perlindungan Pihak Berkuasa Awam 1948 ('APPBA'). Mahkamah memutuskan Wee patut telah memfailkan permohonannya dalam tempoh tiga tahun selepas dia meningkat umur persaraan 50 tahun pada 26 Jun 2003. Wee merayu terhadap keputusan itu kepada Mahkamah Rayuan.

**Diputuskan**, bersetuju dengan keputusan Mahkamah Tinggi dan membenarkan rayuan yang dipohon dalam permohonan semakan kehakiman:

(1) Mahkamah bersetuju dengan keputusan Mahkamah Tinggi bahawa perkara 48(1)(e) Perlembagaan tidak terpakai untuk sabitan penghinaan kerana pelanggaran perintah mahkamah di mahkamah sivil tetapi tidak bersetuju dengan kesimpulan yang tuntutan perayu telah luput had masa statut (lihat perenggan 6).

(2) Mahkamah Tinggi telah gagal menilai dan mempertimbangkan sewajarya pendirian tidak konsisten yang diambil oleh responden, tindakan yang tidak diambil dalam berhubungan dengan perayu, langkah-langkah yang patut diambil oleh responden untuk menggunakan peluang undang-undangnya sebelum memfailkan permohonan semakan kehakiman, dan, paling penting, setakat mana responden terjejas (penafian pencen yang berterusan, tidak termasuk gratuiti), semua yang merupakan faktor-faktor yang patut telah mendesak Mahkamah Tinggi mengira tempoh had masa 36 bulan dari tarikh surat yang ditulis oleh Bahagian Pencen bertarikh 21 September 2007 (lihat perenggan 21).

(3) Kedudukan yang diambil oleh responden adalah tidak konsisten dan tidak boleh dipertahankan. Jika dia berhak mendapat gratuiti meskipun terdapat sabitan kerana penghinaan sivil, sewajarnya berhak mendapat pencen. Ia tidak mungkin wajar pada masa ini untuk membatalkan tuntutan untuk pencen dengan bergantung kepada had masa. Malah hujah had masa itu mempunyai kecacatannya, kerana fakta menunjukkan keadaan terjejas yang berterusan iaitu penafian berterusan kelayakan pencen perayu sejak 20 Jun 2003. Halangan 36 bulan patut

JOBNAME: No Job Name PAGE: 5 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



dikira bukan hanya 'next after the act, neglect or default complained of' tetapi 'in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof' (lihat perenggan 17).

(4) Mahkamah tidak mendapati apa-apa kelewatan tidak munasabah di pihak perayu dalam memfailkan permohonan semakan kehakiman oleh kerana dia telah menggunakan semua peluang undang-undangnya dalam bentuk rayuan, dan akhirnya, penepian perintah injunksi yang berjaya, diikuti dengan pembatalan guaman yang merupakan asas perintah itu pada mulanya. Adalah tidak adil sekarang untuk mendendanya kerana pelanggaran perintah, atau mengganggu perintah, yang akhirnya dibuktikan salah dari segi undang-undang (lihat perenggan 18).

(5) Berhubung perkara 48(1)(e) Perlembagaan, berdasarkan konteks dan susunan ayat peruntukan, ia hendaklah dihadkan kepada sabitan untuk kesalahan jenayah oleh kerana pembatalan hilang kelayakan menjangkakan keadaan di mana pengampunan percuma boleh diterima daripada Yang di-Pertuan Agong. Seseorang yang disabitkan dan dihukum kerana penghinaan sivil tidak boleh memperoleh dengan sendiri pengampunan percuma dan oleh itu, berdasarkan alasan, peruntukan tidak boleh ditafsirkan sewajarnya sebagai merangkumi penghinaan sivil. Penghinaan yang dilakukan dalam kes ini adalah lebih bersifat penghinaan sivil kerana tujuan perintah mahkamah adalah untuk memaksa pematuhan untuk faedah pihak persendirian (plaintif dalam guaman sivil). Kesalahan itu bukan bersifat 'public' (lihat perenggan 19–20). ]

**Notes**

For a case on limitation period, see 9 *Mallal's Digest* (4th Ed, 2012 Reissue) para 2324.

**Cases referred to**

*Fan Yew Teng v Setiausaha, Dewan Ra'kyat & Ors* [1975] 2 MLJ 40 (refd)
*Jayaratnam JB v Attorney General* [1990] 3 MLJ 211, HC (refd)
*Michael Ben anak Panggi v PP* [1979] 2 MLJ 65 (refd)
*Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] 3 CLJ 751, FC (refd)

**Legislation referred to**

Federal Constitution art 48(1)(e)
Members of Parliament (Remuneration) Act 1980 s 2(a), First Schedule, para 2(1)
Public Authorities Protection Act 1948 s 2(a)
Representation of the People Act 1981 s 1
Rules of the High Court 1980 O 18 r 19(1)(a), O 53

JOBNAME: No Job Name PAGE: 6 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



**Appeal from:** Application for Judicial Review No R2–25–321 of 2007 (High Court, Kuala Lumpur)

*Wee Choo Keong (Wee Choo Keong & Faaiz) for the appellant.*
*Shamsul bin Bolhassan (Senior Federal Counsel, Attorney General's Chambers) for the respondent.*

**Mohamad Ariff JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** This was an appeal in a judicial review application under O 53 of the Rules of the High Court 1980. The appeal by the applicant, Wee Choo Keong, raised a short issue of constitutional law concerning the entitlement of a Member of Parliament to his gratuity and pension upon retirement after he was charged and convicted of contempt of court for basically evading service of an injunction against him. By a significant twist of events, the suit which formed the basis for the contempt proceedings against him was subsequently struck out and the order for the injunction set aside. The relevant background facts are examined in greater detail in a separate s of this judgment.

**[2]** Under art 48(1)(e) of the Federal Constitution , a person is disqualified from being a member of either House of Parliament if he has been convicted of 'an offence by a court of law in the Federation' and sentenced to imprisonment for a term of not less than one year, or to a fine of not less than two thousand ringgit and has not received a free pardon. As for the entitlement to gratuity and pension, the applicable law is laid down in the Members of Parliament (Remuneration) Act 1980 ('MPRA'). Paragraph 14, First Schedule of MPRA provides:

> (1) No pension or gratuity shall be granted under the Schedule to any person who has become disqualified from being a member of either House of Parliament under circumstances described in para (e) or (f) of Clause (1) of art 48 of the Constitution.
>
> (2) If any person to whom a pension has been granted under the Schedule has become disqualified from being a member of either House of Parliament under circumstances described in subpara (1), the pension shall forthwith cease:
>
> Provided that the pension shall be restored with retrospective effect in the case of a person whose disqualification under para (e) of Clause (1) of art 48 of the Constitution is removed by the Yang di-Pertuan Agong.

THE HIGH COURT DECISION

**[3]** The learned High Court judge who heard the judicial review application in fact held that the disqualification under art 48(1)( e ) did not

JOBNAME: No Job Name PAGE: 7 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



apply to contempt proceedings of a civil nature, but nevertheless dismissed the application on another ground, namely, the application was statute-barred under s 2(a) of the Public Authorities Protection Act 1948 ('PAPA'), which provides, inter alia, that any suit, action or proceeding against any person 'for any act done in pursuance of or execution or intended execution of any written law or of any public duty authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authorit' must be commenced within 36 months 'next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof'. There was no dispute that s 2(a) applied to a decision taken under MPRA.

**[4]** The appellant attained his pensionable age of 50 on 26 June 2003, but the judicial review application was filed only on 30 October 2007. The learned judge of the High Court held that the applicant 'had slept on its rights and the cause of action had lapsed on 26 June 2006'.

**[5]** In relation to the applicability of art 48(1)(e), however, the learned High Court judge clearly held that it did not apply to contempt proceedings in a Civil court. See para (60) of the judgment, reading:

> In the context of art 48(1)(e) of the Federal Constitution, I think the phrase 'he has been convicted of an offence by a court of law' refers to a person who has been convicted of an offence by a Criminal Court and does not include a person who has been found guilty for contempt of court by a Civil Court. This holding is also consistent with the definition of 'convicted' or 'conviction' given by other statutes ...

## OUR DECISION

**[6]** We allowed the applicant's appeal by a unanimous decision with costs of RM5,000 to be paid by the respondent. We agreed with the learned judge's decision that art 48(1)(e) of the Federal Constitution did not apply to a conviction for contempt for breach of a court order in a civil court, but disagreed with the conclusion that the applicant's claim was statute-barred. The order of the High Court was set aside and we granted the orders of certiorari and mandamus as prayed in the applicant's substantive application for judicial review, namely, (a) an order of certiorari to quash the whole decision of the respondent as contained in the respondent's letter of 21 September 2007, and (b) an order of mandamus to order the respondent to pay the applicant all pensions after the applicant attained the age of 50 years old (ie 26 June 2003) as provided under the Members of Parliament (Remuneration) Act 1980 (Act 237), with interest at 8%pa from 26 June 2003 until realisation.

JOBNAME: No Job Name PAGE: 8 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



THE MATERIAL FACTS

[7] The material facts were analysed in detail by the learned judge in his judgment. It is not necessary to repeat all the facts here. For purposes of the appeal, it is only relevant to underline some key facts. These are enumerated below.

(a) The applicant was elected as a Member of Parliament for the Parliamentary constituency of Bukit Bintang from 21 January 1990 to 6 April 1995.

(b) He was re-elected as a Member of Parliament for the same constituency for a second term on 21 April 1995.

(c) During the currency of his first term as a Member of Parliament, a suit was filed against him and two other defendants on 9 February 1993 by companies in the MBf group for alleged conspiracy to injure these companies.

(d) The MBf companies obtained an ex parte injunction against him and the other defendants on 9 December 1993.

(e) Arising from the breach of the ex parte injunction and evasion of service thereof, contempt proceedings were commenced against the applicant resulting in him being found liable for contempt and sentenced to be committed to prison for two years for breach of the injunction and another two years for evasion of service.

(f) The applicant appealed to the; Supreme Court. On 14 April 1995, the Supreme Court allowed hisappeal on the alleged breach of the court order and set aside the jail sentence but, by a majority decision, found the applicant in contempt of court for evasion of service of the injunction. The Supreme Court imposed a fine of RM7,000.

(g) The applicant thereafter found himself disqualified to hold office as a Member of Parliament in an election petition filed by the candidate who lost in the election for the Bukit Bintang constituency. A fresh by-election was not called but the Election judge declared the losing candidate as the properly elected candidate for the constituency.

(h) There was an earlier application filed by the applicant to set aside the ex parte injunction and to strike out the suit by the MBf companies. This application to set aside the injunction was heard and dismissed by the High Court on 6 August 1996.

(i) The applicant appealed against this judgment.

(j) On 26 June 2003, the applicant reached the age of 50 years.

JOBNAME: No Job Name PAGE: 9 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



(k) On 20 April 2007, the appeal by the applicant on the setting aside of the injunction was heard by the Court of Appeal. The Court of Appeal unanimously allowed his appeal. The ex parte injunction order was set aside by the unanimous decision of the Court of Appeal.

(l) On 20 June 2007, the High Court struck out the suit by the MBf companies under Or 18 r 19(1)(a) of the Rules of the High Court 1980.

**[8]** The foregoing are the bare basic facts. But for the contempt proceedings and the decision of the Supreme Court imposing the fine of RM7,000 on him for evasion of service of the ex parte injunction order, and the consequent decision in the election petition, the applicant would have remained as a Member of Parliament for Bukit Bintang for the second term. As the above sequence will show, the applicant finally succeeded in setting aside the ex parte injunction and had the suit on which the ex parte injunction was based struck out only in April and June 2007, namely, after he had attained 50 years old. He was not paid his pension when he turned 50, but interestingly he received his gratuity.

**[9]** It appeared from the record that there was no correspondence from the respondent to him on his pension entitlement until he wrote letters to inquire about it after he had exhausted his appeal to the Court of Appeal and the striking out application in the High Court. The first letter he wrote was on 7 August 2007, soon after the suit was struck out. This letter was addressed to 'Pengarah, Bahagian Pencen', and it read in its material parts:

> Tuan,
>
> PENCEN UNTUKAHLIPARLIMEN
>
> Dengan hormatnya saya merujuk kepada perkara di atas. Adalah dimaklumkan bahawa saya telah terpilih sebagai Ahli Parlimen untuk kawasan Bukit Bintang pada 1990 sehingga 1995. Saya sekarang telah berusia 54 tahun dan saya percaya bahawa saya layak menerima pencen.
>
> Adalah sangat dihargai sekiranya tuan dapat meneliti perkara ini agar saya dapat menerima pencen saya dengan segera ...

**[10]** It will be noted from the contents of this letter that the applicant claimed his pension entitlement on the basis on his first term tenure as a Member of Parliament. This was consistent with para 2(1), First Schedule, of MPRA, which required 'thirty six months of reckonable service'. There was again no dispute that para 2(1) applied. The dispute turned on the effect of the alleged disqualification mentioned earlier. There was no immediate reply to this letter.

**[11]** The record disclosed another letter was sent by the applicant on 5 September 2007, and yet another on 21 September 2007. The letter of

JOBNAME: No Job Name PAGE: 10 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



21 September 2007 was trenchant in tone and the applicant made known his dissatisfaction on the absence of a reply after 16 days and referred in general to, inter alia, 'the attitude of the staff (in the Bahagian Pencen) as the most unacceptable and disgraceful whereby they do not have the decency to acknowledge receipt of a letter from former Member of Parliament ...'

**[12]** The record nevertheless showed there was a reply carrying the same date, ie 21 September 2007, from the *Bahagian Pencen*, which was couched in an apologetic manner and referring to the earlier letter of 7 August 2007. It said, inter alia:

> Tuan,
>
> PEMBAYARAN PENCEN UNTUK AHLI PARLIMEN
>
> Dengan segala hormatnya saya diarah merujuk kepada surat tuan bertarikh 7 Ogos 2007 mengenai perkara di atas.
>
> 2 Seperti mana tuan sedia maklum, tuan mula menjadi Ahli Parlimen, Bukit Bintang dari 21 Oktober 1990 sehingga 5 April 1995. Kedudukan ini melayakkan tuan untuk menerima ganjaran dan pencen apabila Parlimen dibubarkan pada 6 April 1995. Malah tuan telah pun dibayar ganjaran sebanyak RM63,600 ... Namun begitu, mengikut peruntukan perenggan 2(1) Jadual Pertama Akta Ahli Parlimen (Akta 237):
>
> > Seseorang yang berhenti menjadi Ahli atau Anggota boleh diberi pencen jika dia telah, menyempurnakan 36 bulan perkhidmatan yang boleh dimasukira:
> >
> > Dengan syarat bahawa jika seseorang Ahli atau Anggota untuk pertama kalinya pada atau selepas 1 hb Julai 1990 berhenti menjadi Ahli atau Anggota apabila menyempurnakan tiga puluh enam bulan perkhidmatan yang boleh dimasukira tetapi belum mencapai umur lima puluh tahun pada tarikh dia berhenti menjadi Ahli atau Anggota, dia boleh diberi pencen hanya apabila dia kemudiannya mencapai umur lima puluh tahun.
>
> Dengan itu, pencen tuan hanya boleh dibayar apabila mencapai umur 50 tahun iaitu pada 26 Jun 2003.
>
> 3 Walau bagaimanapun, Mahkamah Persekutuan pada 14 April 1995 telah mensabit kesalahan dan menjatuhkan hukuman denda sebanyak RM7,000.00 atas kesalahan tuan menghina Mahkamah. Perkara ini telah mengakibatkan tuan hilang kelayakan untuk menerima pencen sepertimana yang telah diperuntukkan di bawah ... (reference was made to para 14, First Schedule MPRA and art 48 of the Federal Constitution) ...
>
> 4 Memandangkan sehingga kini Jabatan ini masih belum dimaklumkan mengenai apa-apa penghapusan hilang kelayakan tuan bagi maksud perenggan 14(2) Jadual Pertama kepada Akta Ahli Parlimen (Akta 237), maka Jabatan ini tidak dapat membayar kepada tuan pencen bulanan. Keputusan ini sepatutnya dimaklumkan kepada tuan ketika dijatuhkan hukuman atau mencapai umur 50 tahun iaitu pada 26 Jun 2003 yang lalu. Namun begitu, Jabatan ini gagal untuk berbuat demikian dan ingin memohon maaf di atas kekhilafan ini. Sebarang kesulitan yang timbulberkaitan dengan masalah ini amat dikesali ...

JOBNAME: No Job Name PAGE: 11 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



**[13]** This letter from *Bahagian Pencen* was noteworthy in its acknowledgment, and apology, that the applicant should have been informed earlier that his pension could not be paid because of the conviction for the contempt of court and the fine imposed by the Federal Court on 14 April 1995, and the *Bahagian Pencen* had yet to be informed of any removal (the letter referred to 'penghapusan') of the disqualification.

THE ISSUES

**[14]** Against these salient, material facts, the issues became (a) whether for purposes of calculating the 36 months for purposes of limitation under PAPA, the period should run from the date of this letter or the date when the applicant attained 50 years old, ie the date when he should have been paid his gratuity and pension under MPRA; and (b) whether *Bahagian Pencen* was correct in law to conclude that the applicant was disqualified by reason of being convicted and fined beyond the threshold of 'not less than two thousand ringgit and has not received a free pardon' for contempt of court in a civil court.

ANALYSIS

*Limitation*

**[15]** The applicant/appellant, who is an advocate and solicitor, appeared in person to argue the appeal. He argued forcefully how the Bahagian Pencen had not even written to him all this while since 2003 until he had to write to them to inquire after exhausting his avenues of appeal and striking out the suit by the MBf companies. The appellant drew our attention to para 4 of the letter from the Bahagian Pencen to impress upon us that the Department had admitted they 'had not done their job' and had not communicated with him. The argument on limitation, moreover, according to the appellant's submission, was never raised in any of the respondent's affidavits filed in the judicial review application. This, however, was a relatively minor point since a s 2(a) of the PAPA limitation issue need not be expressly pleaded (*Tasja Sdn Bhd v Golden Approach Sdn Bhd* [2011] 3 CLJ 751). The more fundamental issue was whether s 2(a) applied, or could be made to apply at all, in the sense advanced by the respondent.

**[16]** The appellant highlighted the important and jarring fact that he had been paid his gratuity. This fact was even acknowledged in the letter from the *Bahagian Pencen*. The irony of the situation was not lost on us, since the disqualification, if it existed, would apply equally to entitlements to pension and gratuity. For emphasis, the relevant legal provision, para 14, First Schedule of MPRA, earlier referred to, bears repeating:

(1) No pension *or gratuity* shall be granted under the Schedule to any person who

JOBNAME: No Job Name PAGE: 12 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



has become disqualified from being a member of either House of Parliament under circumstances described in para (e) or (f) of Clause (1) of art 48 of the Constitution. (Emphasis added.)

**[17]** The position taken by the respondent was, to our mind, inconsistent and untenable. The point is a short one: if he was entitled to gratuity despite the conviction for civil contempt, surely he should likewise be entitled to his pension. It could not be right to now defeat the claim for the pension by a sterile reliance on limitation. This was legal positivism most displaced, and a shade irrational. In any event, even the limitation argument had its flaws, for the facts here showed a situation of a continuing injury, ie a continuing denial of the appellant's pension entitlement since 26 June 2003. The 36 months bar had to be calculated not only 'next after the act, neglect or default complained of', but 'in the case of a continuance of injury or damage, within 36 months next after the ceasing thereof'.

**[18]** In our view, the appellant was correct in urging us to calculate the period of limitation from the date of the 21 September 2007 letter from the *Bahagian Pencen*. As far as the appellant was concerned, we did not find any unreasonable delay on his part in filing the judicial review application since he had to exhaust his legal avenues in the form of the appeal, and ultimately the successful setting aside of the injunction order, followed by the striking out of the suit which was the foundation of the order in the first place. It would seem unfair to now penalise him for breach of an order, or even evasion of an order, which was subsequently proven to be incorrect in law.

*Civil contempt and art 48(1)(e)*

**[19]** As regards the decision of the High Court on whether art 48(1)(e) applied to civil contempt, we were in agreement with the views of the learned judge, who had analysed comprehensively the comparative case authorities and the context of that constitutional provision. We agree that given the context and the wording of this constitutional provision, it must be limited to a conviction for a criminal offence, since the removal of disqualification contemplates a situation where a free pardon could be received from the Yang di-Pertuan Agong. It was obvious that a person convicted of civil contempt and sentenced could not avail himself of a free pardon, and therefore by parity of reasoning, the provision could not be reasonably interpreted as including a civil contemnor. The learned judge very aptly referred to the several cases decided locally and in Singapore where this issue of disqualification of an elected representative was decided. All dealt with convictions after a criminal trial. We refer here to the cases cited in the judgment such as *Fan Yew Teng v Setiausaha, Dewan Ra'kyat & Ors* [1975] 2 MLJ 40, *Michael Ben anak Panggi v Public Prosecutor* [1979] 2 MLJ 65 and *Jayaratnam JB v Attorney General* [1990] 3

JOBNAME: No Job Name PAGE: 13 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



MLJ 211. To buttress the point even further, a look at the English position will be useful. Borrie & Lowe, *The Law of Contempt* (3rd Ed 1996), in referring to s 1 of the Representation of the People Act 1981 of the UK, which incorporates a similar phraseology as our art 48(1)(e), although in a broader context, limits its application to criminal contempt. See the following commentary at p 662 of the text:

> Under s 1 of the Representation of the People Act 1981:
>
> > A person found guilty of one or more offences ... and sentenced or ordered to be imprisoned or detained ... for more than one year, shall be disqualified for membership of the House of Commons while detained anywhere in the British Islands or the Republic of Ireland in pursuance of the sentence or order while unlawfully at large at a time when he would otherwise be so detained.
>
> This would appear to apply to criminal but not civil contempt since the Act only applies to those found guilty of an offence.

**[20]** On the facts of this present case, the contempt committed was more in the nature of a civil contempt , since the purpose of the court order was to compel compliance for the benefit of a private party (the MBf companies). The offence was not essentially of a 'public' nature. See also the commentary in Borrie & Lowe, *The Law of Contempt*, at p 655:

> In broad terms it is easy enough to distinguish criminal contempt from civil contempt. Criminal contempt are essentially offences of a public nature comprising publications or acts which interfere with the due course of justice as, for example, by tending to jeopardise the fair hearing of a trial or by tending to deter or frighten witnesses or by interrupting court proceedings or by tending to impair public confidence in the authority or integrity of the administration of justice. Civil contempt, on the other hand, are committed by disobeying court judgments or orders either to do or abstain from doing particular acts ... Civil contempt are therefore essentially 'offences' of a private nature since they deprive a party of the benefit for which the order is sought ...

## CONCLUSION

**[21]** The appeal brought to the fore an issue of interpretation of art 48(1)(e) of the Federal Constitution, overlaid with a subsidiary issue of limitation under PAPA, in the context of pension rights of a Member of Parliament. It called for a proper, reasonable, purposive and contextual interpretation of the legal provisions. We found that the approach adopted by the High Court in addressing art 48(1)(e) of the Federal Constitution was correct, but found a misdirection when it came to the consideration of the issue of limitation under s 2(a) of PAPA. The High Court had failed to properly evaluate and consider the jarring inconsistency in the stand taken by the respondent , the inaction in corresponding with the appellant, the reasonable steps taken by the appellant to exhaust his legal avenues before filing the judicial review application, and

JOBNAME: No Job Name PAGE: 14 SESS: 1 OUTPUT: Thu Dec 18 13:12:05 2014



most importantly, the nature of the injury caused to the plaintiff (the continuing deprivation of the pension, though not the gratuity), all of which were factors which should have compelled the learned judge to calculate the limitation period of 36 months from the date of the letter written by the *Bahagian Pencen* dated 21 September 2007.

**[22]** For these reasons, we allowed the appeal by a unanimous decision with costs of RM5,000 to be paid by the respondent and set aside the order of the High Court. We consequently ordered that the orders of certiorari and mandamus as prayed in the applicant's substantive application for judicial review be granted, namely, (a) an order of certiorari to quash the whole decision of the respondent as contained in the respondent's letter of 21 September 2007, and (b) an order of mandamus to order the respondent to pay the applicant all pensions after the applicant attained the age of 50 years old (ie 26 June 2003) as provided under the Members of Parliament (Remuneration) Act 1980 (Act 237) with interest at 8%pa from 26 June 2003 until realisation.

*Appeal allowed, decision of the High Court set aside and prayers sought for in judicial review application granted.*

Reported by Ashok Kumar